



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 22, 2004

Ms. Sandra Smith
Executive Director
Texas Board of Chiropractic Examiners
333 Guadalupe, Suite 3-825
Austin, Texas 78701-3942

OR2004-3308

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 200003.

The Texas Board of Chiropractic Examiners (the "board") received a request for information relating to Dr. Roger Canard. You state that the board is releasing some of the requested information. You claim that other responsive information is excepted from disclosure under sections 552.026, 552.101, 552.102, 552.114, and 552.136 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information that other statutes make confidential. The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by

a person acting for such agency or institution.¹ *Id.* § 1232g(a)(4)(A). The board is not an educational agency or institution.

FERPA provides, however, that an educational agency or institution may only transfer personal information to a third party “on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student.” *Id.* § 1232g(b)(4)(B). The federal regulations provide that a third party that receives such information from an educational agency may use the information only for the purposes for which the disclosure was made. *See* 34 C.F.R. § 99.33(a)(2). In this instance, it appears that the board may have received the submitted transcripts from an educational agency or institution. To the extent that the board did so receive these transcripts from an educational institution, under sections 1232g(b)(4)(B) and 99.33(a)(2) the board may only release any such transcript upon Dr. Canard’s consent. To the extent that the board did not receive any of these transcripts from an educational institution, the board may not withhold any such transcript under FERPA.

We note that portions of the information submitted as Exhibit B are subject to the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. The MPA governs the disclosure of medical records. Section 159.002 of the MPA provides in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
- (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of chapter 552 of the Government Code. *See* Open Records Decision No. 598 (1991). We also have concluded that when a file is created as the result of a hospital stay, all of the documents in the file that

¹Section 552.026 incorporates FERPA into chapter 552 of the Government Code. *See* Gov’t Code § 552.026.

relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). Further, information that is subject to the MPA also includes information obtained from medical records. *See* Occ. Code § 159.002(a), (b), (c). Medical records must be released on the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). The information submitted as Exhibit B includes records and information from records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician. This information, which we have marked, is confidential under the MPA and may only be released in accordance with the MPA. *See* Open Records Decision No. 598 (1991).

You claim that portions of the submitted information are subject to chapter 201 of the Occupations Code, which governs the practice of chiropractic. Section 201.402 of the Occupations Code provides in pertinent part:

(a) Communications between a chiropractor and a patient relating to or in connection with any professional services provided by a chiropractor to the patient are confidential and privileged and may not be disclosed except as provided by this subchapter.

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a chiropractor that are created or maintained by a chiropractor are confidential and privileged and may not be disclosed except as provided by this subchapter.

(c) A person who receives information from the confidential communications or records, excluding a person listed in Section 201.404(a) who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 201.402(a)-(c). The information submitted as Exhibit B includes records and information obtained from records of the identity, diagnosis, evaluation, or treatment of a patient by a chiropractor that were created or are maintained by a chiropractor. This information, which we have marked, is confidential under section 201.402 of the Occupations Code and may only be released in accordance with chapter 201 of the Occupations Code. *See id.* §§ 201.403, .404, .405 (exceptions to confidentiality and consent provisions).

Next, we note that a social security number is confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number under any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number that appears in Exhibit B is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that requires or authorizes the board to obtain or maintain this social security number. Thus, we have no basis for concluding that this social security number was obtained or is maintained under such a law and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing the social security number that we have marked, the board should ensure that it was not obtained and is not maintained by the board under any provision of law enacted on or after October 1, 1990.

You also raise section 552.102, which excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). This section is applicable only to the personnel information of officials and employees of governmental bodies. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.); Open Records Decision No. 327 at 2 (1982). As the submitted information pertains to private individuals, rather than public officials and employees, we conclude that the board may not withhold any portions of the submitted information under section 552.102.

In addition, we note that section 552.101 also encompasses the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with the common-law right to privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy under section 552.101 encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. *See* Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). We note, however, that because "the right of privacy is purely personal," the common-law right to privacy "terminates upon

the death of the person whose privacy is invaded.” *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. App.—Texarkana 1979, writ ref’d n.r.e.); *see also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. 145, 146-47 (N.D. Tex. 1979) (“action for invasion of privacy can be maintained only by a living individual whose privacy is invaded”) (quoting Restatement of Torts 2d). We have marked the information in Exhibits B and C that you must withhold under section 552.101 in conjunction with common-law privacy.

You also claim that portions of the submitted information are excepted from disclosure pursuant to section 552.136. This section provides as follows:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov’t Code § 552.136. We note, however, that section 552.136 was enacted to protect the privacy of an individual, and therefore, the protection extinguishes upon the individual’s death. *See Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d at 491; *See also Justice v. Belo Broadcasting Corp.*, 472 F. Supp. at 146-47. We have marked account number information in Exhibit C that the board must withhold under section 552.136 of the Government Code. The board must also withhold pursuant to section 552.136 account numbers of deceased persons in Exhibit C, but only if the accounts with which the numbers are associated were jointly owned by the deceased and a person who is joint holder of the account. Otherwise, the board must release such account numbers.

Lastly, we note that Exhibit B contains e-mail addresses. As amended by the 78th Legislature, section 552.137 provides as follows:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. Section 552.137 is not applicable to the types of e-mail addresses listed in section 552.137(c) or to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked the e-mail addresses in Exhibit B that are excepted from disclosure under section 552.137(a) of the Government Code. The board must withhold these e-mail addresses under section 552.137, unless the individual to whom a particular e-mail address belongs has affirmatively consented to its public disclosure.

In summary: (1) educational transcripts in Exhibit A that the board received from an educational institution may only be released on Dr. Canard's consent, as provided by section 1232g(b)(4)(B) of title 20 of the United States Code and section 99.33(a)(2) of

title 34 of the Code of Federal Regulations; (2) the information that is confidential under the MPA in Exhibit B may only be released in accordance with the MPA; (3) the information that is confidential in Exhibit B under section 201.402 of the Occupations Code may only be released in accordance with chapter 201 of the Occupations Code; (4) the board may be required to withhold the social security number in Exhibit B under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code; (5) the board must withhold the marked information in Exhibits B and C pursuant to section 552.101 in conjunction with common-law privacy; (6) the board must withhold the account number information we have marked under section 552.136; (7) the board must also withhold pursuant to section 552.136 account numbers of deceased persons in Exhibit C, but only if the accounts with which the numbers are associated were jointly owned by the deceased and a person who is joint holder of the account, and (8) the board must withhold the e-mail addresses we have marked under section 552.137, unless the person to whom an e-mail address belongs has affirmatively consented to its public disclosure. The board must release the rest of the submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

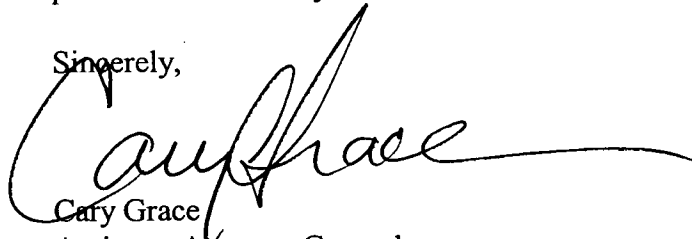
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cary Grace
Assistant Attorney General
Open Records Division

CG/JWM/sdk

Ref: ID# 200003

Enc: Submitted documents

c: Mr. Jeff Rodriguez
JJR Inc.
P.O. Box 786667
Dallas, Texas 75378
(w/o enclosures)